

THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1988 CUMULATIVE SUPPLEMENT

Volume 1C, Part I

Chapters 15 through 17E

Prepared under the Supervision of

**The Department of Justice
of the State of North Carolina**

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 368 S.E.2d 309. For complete scope of
annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

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Preface

This Cumulative Supplement to Volume 1C, Part I contains the general laws of a permanent nature enacted by the General Assembly through the 1987 (Regular Session, 1988) Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included herein. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1A, Part I for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1987 (Regular Session, 1988) Session affecting Chapters 15 through 17E of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 322, p. 116.

North Carolina Court of Appeals Reports through Volume 89, p. 583.

South Eastern Reporter 2nd Series through Volume 368, p. 309.

Federal Reporter 2nd Series through Volume 846, p. 78.

Federal Supplement through Volume 683, p. 1410.

Federal Rules Decisions through Volume 119, p. 460.

Bankruptcy Reports through Volume 85, p. 182.

Supreme Court Reporter through Volume 108, p. 1762.

North Carolina Law Review through Volume 66, p. 837.

Wake Forest Law Review through Volume 23, p. 398.

Campbell Law Review through Volume 10, p. 352.

Duke Law Journal through 1987, p. 976.

North Carolina Central Law Journal through Volume 17, p. 118.

Opinions of the Attorney General.

Editorial

in strong, slightly rounded, large, soft dried seeds of palm oil, however, particularly when not much dried, the dried palm oil seeds are rather like the common linseed seeds and should be well stored. When dried, however, they will not hold out well, but when stored in airtight containers, in a cool, dry place, they will keep for a long time.

Table V to page 8

It is difficult to estimate the amount of oil to be expected from any given amount of palm oil seeds, but the following table gives some idea of the amount of oil to be expected from a given amount of palm oil seeds.

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The General Statutes of North Carolina 1988 Cumulative Supplement

VOLUME 1C, Part I

Chapter 15.

Criminal Procedure.

Article 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

Sec.

15-155.1. Reports to district attorneys of aid to dependent children and illegitimate births.

15-155.2. District attorney to take action on report of aid to dependent child or illegitimate birth.

Article 22.

Review of Criminal Trials.

Sec.

15-217.1. Filing petition with clerk; delivery of copy to district attorney, review of petition by judge.

Article 23.

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15-223, 15-224. [Recodified.]

ARTICLE 1.

General Provisions.

§ 15-1. Statute of limitations for misdemeanors.

Legal Periodicals. —

For survey of 1982 criminal law, see
61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

§ 15-6. Imprisonment to be in county jail.

OPINIONS OF ATTORNEY GENERAL

This section has two prongs. First, it makes clear the type of facility in which a convicted defendant shall not serve a term of imprisonment, unless permitted under other legislation, and

second, it provides that a person may only be sentenced to imprisonment in the county where the crime was committed. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County

Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Place of Imprisonment Where Sentence Less than and Greater than 180 Days. — Absent specific statutory authorization (See, e.g., §§ 15A-711, 148-32.1, 162-38 to 162-40), imprisonment of misdemeanants with sentences of 180 days or less must be in the local confinement facility of the county where the crime was committed. If the sentence is greater than 180 days, commitment may be either to such a local facility or to the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Section Overridden by § 15A-1352 as to Certain Criminals. — While § 15-6 applies to both felons and misdemeanants, § 15A-1352 overrides § 15-6 to the extent it provides for certain felons and misdemeanants to be sentenced to terms of imprisonment under the jurisdiction of the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Effect of § 15A-1352 on Section. — Section 15A-1352 is an exception to § 15-6 as to those misdemeanants with sentences of more than 180 days, because they may be sentenced to serve their term of imprisonment under the jurisdiction of the Department of Correction, but as to those not placed in the custody of the Department of Correction, the only effect of § 15A-1352 is to broaden the term "common jail" to include other types of local facilities which may be used under appropriate circumstances. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

County of Venue Irrelevant in Determining Place of Imprisonment. — Even though the venue of a criminal trial may properly be in a county other than the one in which the crime occurred, to the extent that § 15-6 applies, it requires imprisonment to be in the county jail of the county where the crime occurred. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.

CASE NOTES

Basis for Probable Cause. —

Probable cause for an administrative inspection warrant may be based on (1) specific evidence of an existing violation or (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. In order to meet the requirements of the second standard, an applicant for an inspection warrant must show that: (1) There exists a legally authorized inspection program which naturally included the property; (2) that the general administrative enforcement plan is based on reasonable legislative or administrative standards; and (3) that the administrative standards are being applied to the particular establishment on a neutral

basis. *Brooks v. Butler*, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

Scope and Objects of Search Must Be Included, etc. —

A warrant authorizing inspection of all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things is not overbroad. A warrant authorizing a general inspection of an industry naturally contemplates a comprehensive inspection since the location of possible violations is unknown. *Brooks v. Butler*, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

ARTICLE 13.

Venue.

§ 15-129. In offenses on waters dividing counties.

CASE NOTES

Cited in *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984).

§ 15-131. Assault in this State, death in another.

CASE NOTES

Jurisdiction of County Grand Jury. — Under the law of determining jurisdiction as between states, jurisdiction lies in this state if any of the essential acts forming the crime take place in

this state. This same rationale extends to jurisdiction of the county grand jury to indict. *State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (1986).

ARTICLE 15.

*Indictment.***§ 15-144. Essentials of bill for homicide.**

CASE NOTES

Article 1, § 23, N.C. Const., and § 15A-924(a)(5) did not specifically repeal this section, nor did they repeal it by implication. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

This section does not prevail over the language of § 15-155. *State v. James*, — N.C. —, 365 S.E.2d 579 (1988).

Indictment in form prescribed, etc. —

An indictment which complies with the short form indictment authorized by this section is sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

This section contains no requirement that the indictment specify the degree of murder sought. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Nor Defendant's County, etc. —

Omission of the county of defendant's residence from murder indictment did not make the indictment fatally defective, since the county of defendant's resi-

dence did not have to be proved. *State v. James*, — N.C. —, 365 S.E.2d 579 (1988).

Omission of the phrase "with force and arms" does not render a defendant's indictment for murder fatally defective. *State v. James*, — N.C. —, 365 S.E.2d 579 (1988).

Essentials Make No Distinction, etc. —

An indictment which meets the requirements of this section will support a plea of guilty to or a conviction of either first or second degree murder. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

A prosecutor is not required to determine, before the return of the indictment, whether he will ultimately prosecute a defendant for murder in the first or second degree. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Offenses Which Indictment Will Support. —

The short-form indictment drawn in accordance with this section is sufficient to charge murder in the first degree under a theory of lying in wait, just as it is

sufficient to charge murder in the first degree on the theory of felony murder or premeditation and deliberation. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1 (1987).

Applied in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856

(1984); *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985).

Cited in *State v. Hinson*, 310 N.C. 245, 311 S.E.2d 256 (1984); *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986); *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986); *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987).

§ 15-144.1. Essentials of bill for rape.

CASE NOTES

A short form indictment is constitutionally sufficient to charge a defendant with first degree rape. *State v. Getward*, — N.C. App. —, 365 S.E.2d 209 (1988).

Section Eliminates Requirement, etc. —

In enacting this section, the legislature eliminated the requirement that every element to be proven at trial must be alleged in the indictment. *State v. Walker*, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

When Indictment under this Section Is Constitutional. — An indictment under this section is constitutional if it permits the defendant to prepare a defense and to be protected from subsequent prosecution for the same offense. *State v. Walker*, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Allegation as to Age of Victim. — An allegation that the victim was "a female child eight (8) years old" sufficiently alleged that she was "a child under 12" and satisfied the requirement of subsection (b) of this section as it existed on June 6, 1983. *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986).

State's failure to set forth the marital status of the parties involved is not fatal to an indictment for rape. *State v. Getward*, — N.C. App. —, 365 S.E.2d 209 (1988).

Unnecessary Averments. —

The date given in a bill of indictment usually is not an essential element of

the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Where the indictments for attempted rape fully complied with the requirements set forth in this section, the indictments were not insufficient merely because neither indictment alleged that the victims of the crimes were females. *State v. Bell*, 311 N.C. 131, 316 S.E.2d 611 (1984).

Sufficiency of Indictment under Sections 15-144.1 and 15-144.2. — The short form indictments set out in this section and § 15-144.2 for first-degree rape and first-degree sexual offense provide adequate notice of the charges. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

The provisions of this section do not prevail over § 15-155. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Construction with § 15-155 as to, etc. —

In accord with 1st paragraph in original. See *State v. Welch*, 69 N.C. App. 668, 318 S.E.2d 4 (1984).

Bill of Particulars. — The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

A defendant may request a bill of par-

ticulars to obtain information to supplement the facts contained in the indictment. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Election by State. — By unequivocally arraigning defendant on second-degree rape and by failing thereafter to give any notice whatsoever, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape as arguably supported by the short-form indictment, the state made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape. *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986).

Indictment Upheld. — Indictment for second-degree rape, which met the criteria specified in this section for a proper indictment for rape, was suffi-

cient to allow defendant to prepare a defense and to be protected from double jeopardy, and was thus not fatally defective. *State v. Walker*, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Rape indictment drawn in accordance with this section was sufficient enough to let defendant know that he was charged with the rape of his estranged wife and to allow him to prepare his defense. *State v. Getward*, — N.C. App. —, 365 S.E.2d 209 (1988).

Applied in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984).

Stated in *State v. Roberts*, 310 N.C. 428, 312 S.E.2d 477 (1984).

Cited in *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986); *State v. James*, — N.C. —, 365 S.E.2d 579 (1988).

§ 15-144.2. Essentials of bill for sex offense.

CASE NOTES

Specification of Sexual Act Unnecessary. —

An indictment which charges first degree sexual offense in accordance with this section without specifying which sexual act was committed is sufficient to charge the crime of first degree sexual offense and to put defendant on notice of the accusation. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987).

An indictment drafted pursuant to subsection (b) of this section without specifying which sexual act was committed is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such accusation. Should a defendant require additional information on the nature of the specific sexual act with which he stands charged, he may move for a bill of particulars. *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983).

Defendant May Demand to Know Specific "Sexual Act" Charged. — When the State does not specify at the outset which "sexual act" was committed by a defendant, it can be required to do so before trial on the indictment is had. *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

State Bound by Allegation of Specific Sexual Act. — While the State was not required to allege the specific

nature of the sex act in the indictment, having chosen to do so, it is bound by its allegations. *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Evidence Must Correspond to Allegations. — The evidence in a criminal prosecution must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, the defendant's conviction thereof cannot stand. *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Sufficiency of Indictment under Sections 15-144.1 and 15-144.2. — The short form indictments set out in § 15-144.1 and this section for first-degree rape and first-degree sexual offense provide adequate notice of the charges. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Bill of Particulars. — A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. *State v. Ran-*

dolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack

of timely access to the information significantly impaired the defendant's preparation and conduct of his case. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

§ 15-153. Bill or warrant not quashed for informality.

CASE NOTES

II. FORM AND SUFFICIENCY OF INDICTMENTS AND WARRANTS.

B. Use of Language of Statute.

When Indictment Need Not Be in Words of Statute. —

§ 15-155. Defects which do not vitiate.

CASE NOTES

I. GENERAL CONSIDERATION.

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

The provisions of § 15-144.1 do not prevail over this section. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Words "with force and arms", etc. —

Section 15-144 does not prevail over the language of this section, and the omission of the phrase "with force and arms" does not, therefore, render a defendant's indictment for murder fatally defective. State v. James, — N.C. —, 365 S.E.2d 579 (1988).

Stated in State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984).

Cited in State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

II. TIME OF OFFENSE.

Failure to accurately state the date or time an offense is alleged to have occurred does not invalidate a bill of indictment, nor does it justify reversal of a conviction obtained thereon. State v.

In accord with the main volume. See State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

A child's uncertainty as to the time or particular day when the offense charged was committed shall not be grounds for nonsuit where there is sufficient evidence that the defendant committed each essential act of the offense. State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987).

Variance between Time, etc. —

The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984).

Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

As Where He Relies upon Alibi. —

Where a defendant relies upon a defense of alibi, time becomes essential. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

When time is not of the essence of the offense charged, an indictment

may not be quashed for failure to allege the specific date on which the crime was committed. *State v. Price*, 310 N.C. 596, 313 S.E.2d 556 (1984).

Reversal of Dates, etc. —

The date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Change of Date on Indictment Permitted. — In prosecution for incest, where although the testimony of the young prosecuting witness as to the date of the offense differed from that of her mother, all of the State's evidence showed that the crime, if committed, took place on the Sunday of the weekend during which a certain individual visited the defendant's residence, the

change on the indictment of the date of the offense, as permitted by the trial court, did not substantially alter the charge against the defendant, nor did it unfairly surprise him or prevent him from presenting a defense. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Fatal Variance Not Shown. — There was no fatal variance between the allegations contained in the indictment and the actual proof presented by the State with regard to the date of the offense, where although the warrant and bill of indictment showed the date of the offense as March 13, 1985, the defendant was put on notice as to the child victim's uncertainty as to the date during a probable cause hearing, and where, additionally, the defendant did not in fact rely on the date stated in the indictment. *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986).

ARTICLE 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

§ 15-155.1. Reports to district attorneys of aid to dependent children and illegitimate births.

The Department of Human Resources, by and through the Secretary of Human Resources, shall promptly after June 19, 1959, make a report to each district attorney, setting out the names and addresses of all mothers who reside in his prosecutorial district as defined in G.S. 7A-60 and are recipients of aid to dependent children under the provisions of Part 2, Article 2, Chapter 108A of the General Statutes. Such report shall in some manner show the identity of the unwed mothers and shall set forth the number of children born to each said mother. Such a report shall also be made monthly thereafter setting out the names and addresses of all such mothers who reside in the district and who may have become recipients of aid to dependent children since the date of the last report. (1959, c. 1210, s. 1; 1973, c. 47, s. 2; c. 476, s. 138; 1987 (Reg. Sess., 1988), c. 1037, s. 50.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, deleted "of superior court" following "each district attorney," substituted "prosecutorial district as de-

fined in G.S. 7A-60" for "judicial district," and substituted "Article 2, Chapter 108A" for "Article 3, Chapter 108" in the first sentence.

§ 15-155.2. District attorney to take action on report of aid to dependent child or illegitimate birth.

(c) Repealed by Session Laws 1985, c. 589, s. 8, effective January 1, 1986. (1959, c. 1210, s. 1; 1969, c. 982; 1973, c. 47, s. 2; c. 476, s. 138; 1985, c. 589, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985, c. 589, s. 64 provides that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) are not abated or affected by the act, and that the statutes that would be applicable but for the act remain applicable to those prosecutions.

Session Laws 1985, c. 589, s. 66 provides that rules to implement the act which are authorized to be adopted by the act or which are otherwise authorized to be adopted by law may be adopted at any time after ratification (July 4, 1985), but shall not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment, effective January 1, 1986, deleted subsection (c), which formerly read: "If, however, as a result of the investigation provided for in subsection (a) of this section the district attorney has reason to believe that the mother of the illegitimate child or who is recipient of aid to a dependent child, is a mental defective or suffers from a mental disease, mental disorder or mental illness within the meaning of G.S. 122-35.1, he shall make the affidavit provided for in G.S. 122-42 looking to the commitment of such person to the State hospital pursuant to Article 3, Chapter 122 of the General Statutes."

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

ARTICLE 17.

Trial in Superior Court.

§ 15-167. Extension of session of court by trial judge.

CASE NOTES

Cited in *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984).

§ 15-170. Conviction for a less degree or an attempt.

Legal Periodicals. —

For comment on the defense of legal impossibility in light of *State v.*

Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982), see 19 Wake Forest L. Rev. 605 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Offense Not Included If It Contains Element Not in Other Crime. — A crime is not a lesser included offense of another crime if the former contains any element that the latter does not. *State v. Peoples*, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Applied in *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984).

Cited in *State v. Bullard*, 82 N.C. App. 718, 347 S.E.2d 874 (1986).

III. LESSER AND INCLUDED OFFENSES.

An indictment charging a completed offense is sufficient to support a conviction for attempt to commit the crime charged. This statute applies even though the completed crime and the attempt are not in the same statute. *State v. Slade*, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Indictment charging defendant with the completed offense of giving a con-

trolled substance to an inmate was sufficient to enable him to adequately prepare for trial and to protect him from being twice put in jeopardy for the same offense, so as to support his conviction of attempt to give a controlled substance to an inmate. *State v. Slade*, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Larceny Pursuant to Breaking or Entering. — While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, an indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and this section provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. *State v. McCoy*, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

§ 15-173. Demurrer to the evidence.

CASE NOTES

I. GENERAL CONSIDERATION.

A motion to dismiss under § 15A-1227 is substantively identical to a motion for nonsuit under this section. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Necessity of Objecting, etc., at trial. — Although § 15A-1446(d)(5) allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, this statute is negated by NCRAP Rule 10(b)(3), which states that a defendant may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit at trial. *State v. Jordan*, — N.C. —, 365 S.E.2d 617 (1988).

Applied in *State v. Elliott*, 69 N.C. App. 89, 316 S.E.2d 632 (1984); *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984); *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *State v. Upright*,

72 N.C. App. 94, 323 S.E.2d 479 (1984); *State v. Wilson*, 73 N.C. App. 398, 326 S.E.2d 360 (1985); *State v. Blankenship*, — N.C. App. —, 366 S.E. 2d 509 (1988).

Cited in *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983); *State v. Nelson*, 69 N.C. App. 455, 317 S.E.2d 70 (1984); *State v. Ausley*, 78 N.C. App. 791, 338 S.E.2d 547 (1986); *State v. Spaugh*, — N.C. —, 364 S.E.2d 368 (1988).

II. OTHER MOTIONS COMPARED.

Motion to dismiss under § 15A-1227(a)(1) for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under this section. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985); *State v. Griffin*, 319 N.C. 429, 355 S.E.2d 474 (1987); *State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987).

III. QUESTION PRESENTED BY MOTION.

Question Presented. —

In accord with 9th paragraph in the main volume. See *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

When a defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all of the evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

IV. ALLOWANCE OF MOTION.

Where complete defense is established by State's case, etc. —

When the State's evidence presents a complete defense, a defendant's motion for nonsuit should be allowed. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

V. DENIAL OF MOTION.

B. Appeal from Denial of Motion.

Consideration of Entire Evidence, etc. —

Defendant's exception to the denial of his motion to dismiss, made at the close of all of the evidence, presented the issue of the sufficiency of all of the evidence to go to the jury. Therefore, for purposes of reviewing this assignment of error, the court would consider all of the evidence introduced at trial, and would not determine whether that evidence was competent. *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987).

Question on Appeal Where Defendant Offers Evidence. —

The denial of defendant's motion to dismiss at the close of the State's evidence was not properly at issue on appeal, where defendant chose to offer evidence after his motion was denied and thereby waived appellate review of the trial judge's decision. *State v. Rasor*, 319 N.C. 577, 356 S.E.2d 328 (1987).

Under this section, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as grounds for appeal. *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987).

VI. EVIDENCE.

Renewal of the motion to dismiss at the conclusion of all the evidence compels the court to consider the

motion in light of all the evidence presented at trial. *State v. Britt*, 87 N.C. App. 152, 360 S.E.2d 291 (1987).

Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Defendant's Evidence May Be Considered. — In considering a motion to dismiss made at the close of all the evidence, the defendant's evidence as well as the State's evidence may be considered. *State v. Davis*, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

In reviewing a motion to dismiss at the conclusion of all the evidence, the court must consider any evidence presented by defendant which rebuts the inference of guilt, so long as it is not contradicted by any of the State's evidence. *State v. Britt*, 87 N.C. App. 152, 360 S.E.2d 291 (1987).

Need Not Exclude Every Reasonable Hypothesis, etc. —

In accord with original. See *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Evidence Considered in Light Most Favorable to State. —

In accord with 1st paragraph in the main volume. See *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

In accord with 6th paragraph in original. See *State v. Dow*, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

Upon defendant's motion to dismiss, all the evidence favorable to the State must be considered, such evidence must be deemed true and considered in the light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985).

When defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Contradictions and Discrepancies in Evidence Are for Jury, etc. —

In accord with 1st paragraph in original. See *State v. Dow*, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

Contradictions and Discrepancies, etc. —

Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

VII. INTRODUCTION OF TESTIMONY BY DEFENDANT AT TRIAL.

Effect of Defendant Introducing Testimony, etc. —

In accord with 1st paragraph in the main volume. See State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

In accord with 2nd paragraph in original. See State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), aff'd, 318 N.C. 400, 348 S.E.2d 789 (1986); State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985); State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987); State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987).

ARTICLE 19.

Execution.

§ 15-194. Time for execution.

CASE NOTES

Cited in State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984).

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.2. Allowance in cases of multiple sentences.

CASE NOTES

Where two life sentences which were imposed on defendant were to run concurrently, defendant should have been credited on both life sentences

with time spent in jail awaiting trial. State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987).

ARTICLE 22.

Review of Criminal Trials.

§ 15-217.1. Filing petition with clerk; delivery of copy to district attorney; review of petition by judge.

The proceeding shall be commenced by filing with the clerk of superior court of the county in which the conviction took place a petition, with two copies thereof, verified by affidavit. One copy shall be delivered by the clerk to the district attorney of the prosecutorial district as defined in G.S. 7A-60 who prosecutes the criminal docket of the superior court of the county in which said petition is filed, either in person or by ordinary mail, and the clerk shall enter upon his docket the date and manner of delivery of such copy.

The clerk shall place the petition upon the criminal docket upon his receipt thereof. The clerk shall promptly after the delivery of copy to the district attorney bring the petition, or a copy thereof, to the attention of the resident judge or any judge holding the courts of the district or any judge holding court in the county. Such judge shall review the petition and make such order as he deems appropriate with respect to permitting the petitioner to prosecute such action without providing for the payment of costs, with respect to the appointment of counsel, and with respect to the time and place of hearing upon the petition. If it appears to the judge that substantial injustice may be done by any delay in hearing upon the matters alleged in the petition, he may issue such order as may be appropriate to bring the petitioner before the court without delay, and may direct the district attorney to answer the petition at a time specified in the order, and the court shall thereupon inquire into the matters alleged as directed by the reviewing judge, as in the case of a writ of habeas corpus. If upon review of the petition it does not appear to the judge that an order advancing the hearing or other order is appropriate, he shall return the petition to the clerk with a notation to that effect. (1965, c. 352, s. 1; 1973, c. 47, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 51.)

Effect of Amendments. — The 1987 amendment, effective January 1, 1989, substituted "prosecutorial district as defined in G.S. 7A-60" for "judicial district" in the second sentence of the first paragraph.

ARTICLE 23.

Expunction of Records.

§§ 15-223, 15-224: Recodified as §§ 15A-145 and 15A-146 by Session Laws 1985, c. 636, s. 1, effective July 5, 1985.

Chapter 15A.

Editor's Note. — The legislation and annotations affecting Chapter 15A have been included in a recently published replacement chapter.

Editor's Note to Chapter 15A § 17C-1. *Definitions and policy.*

Editor's Note: The following is from the editor's notes to the 1967 version of the 1967-1968 edition of the North Carolina General Statutes. The editor's notes are not part of the law, but are included here for the reader's information.

Editor's Note to Chapter 15A § 17C-1. *Definitions and policy.*

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Chapter 17.
Habeas Corpus.

ARTICLE 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.

Legal Periodicals. — For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

ARTICLE 8.

Habeas Corpus Ad Testificandum.

§ 17-41. Authority to issue the writ.

CASE NOTES

Applied in State v. Rankin, 312 N.C. 592, 324 S.E.2d 224 (1985).

§ 17-42. Contents of application.

CASE NOTES

Applied in State v. Rankin, 312 N.C. 592, 324 S.E.2d 224 (1985).

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

Sec.

17C-3. North Carolina Criminal Justice Education and Training Standards Commission es-

tablished; members; terms; vacancies.

§ 17C-1. Findings and policy.

Legal Periodicals. — For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

§ 17C-2. Definitions.

Local Modification. — Eastern Band of the Cherokee: 1987, c. 427, s. 4.

OPINIONS OF ATTORNEY GENERAL

Salary Continuation Plan. — If an employee is in a position which (1) requires certification by the Criminal Justice Education and Training Standards Commission, and (2) is within a category listed in § 143-166.13 as defined by the Commission, the employee is covered by

the Salary Continuation Plan covered by that section. Otherwise, the employee is not covered. See opinion of Attorney General to Mr. Gerald Hodnett, Personnel Director, Department of Correction, — N.C.A.G. — (Dec. 8, 1987).

§ 17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to September 1, 1983, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a), serving as a police chief; three members from subdivision (2) of subsection (a), one serving as a police official, one serving as a police officer, and one serving as a company police officer; one member from subdivision (4) of subsection (a), appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5) of subsection (a), one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: one member from subdivision (1) of subsection (a), serving as a police chief; one member from subdivision (2) of subsection (a), serving as a police official; and two mem-

bers from subdivision (4) of subsection (a), one appointed by the League of Municipalities and one appointed by the North Carolina Association of District Attorneys.

For the terms of three years: two members from subdivision (1) of subsection (a), one police chief appointed by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor; one member from subdivision (2) of subsection (a), serving as a police official; and three members from subdivision (4) of subsection (a), one appointed by the North Carolina Law-Enforcement Women's Association, one appointed by the North Carolina Association of Criminal Justice Educators, and one appointed by the North State Law-Enforcement Officers' Association.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of the Department of Crime Control and Public Safety, the Secretary of the Department of Human Resources, the Secretary of the Department of Correction, the President of The University of North Carolina, the Director of the Institute of Government, and the President of the Department of Community Colleges shall be continuing members of the Commission during their tenure. These members of the Commission shall serve ex officio and shall perform their duties on the Commission in addition to the other duties of their offices. The ex officio members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the ex officio members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 31; 1983, c. 558, s. 3; c. 618, ss. 1, 2; c. 807, ss. 1, 2; 1987, c. 282, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective June 4, 1987, substituted "President of the

Department of Community Colleges" for "Director of Law-Enforcement Training of the Department of Community Colleges" in the first sentence of the next-to-last paragraph of subsection (b).

§ 17C-10. Required standards.

OPINIONS OF ATTORNEY GENERAL

Salary Continuation Plan. — If an employee is in a position which (1) requires certification by the Criminal Justice Education and Training Standards Commission, and (2) is within a category listed in § 143-166.13 as defined by the Commission, the employee is covered by

the Salary Continuation Plan covered by that section. Otherwise, the employee is not covered. See opinion of Attorney General to Mr. Gerald Hodnett, Personnel Director, Department of Correction, — N.C.A.G. — (Dec. 8, 1987).

Chapter 17D.

North Carolina Justice Academy.

§ 17D-1. Definitions.

Legal Periodicals. — For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

Chapter 17E.

North Carolina Sheriffs' Education and Training Standards Commission.

Sec.

17E-7. Required standards.

§ 17E-7. Required standards.

(c) In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, may fix other qualifications for the employment and retention of law-enforcement officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of the office, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

Where minimum educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Commission for the reasonable amount of time it will take to achieve the standards required. Upon petition from a sheriff, the Commission may grant a waiver of any provisions of this section (17E-7) for any justice officer serving that sheriff.

(1983, c. 558, s. 1; 1987, c. 783, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987

amendment, effective August 12, 1987, substituted "justice officer" for "deputy" in the second paragraph of subsection (c).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1988

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1988 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

LACY H. THORNBURG

Attorney General of North Carolina





